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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL.,

Petitioners,

v.

KATHERINE JEFFRIES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THIS COURT BOUND BY THE LAW AT THE TIME OF DECISION, WHERE THE STATUTORY PROVISIONS AND REGULATIONS RELIED UPON BY PETITIONERS HAVE BEEN AMENDED, DELETING ANY ARGUABLE AUTHORITY FOR THEIR POSITION?

II. WHETHER STATE ACTION EXISTS WHEN A STATUTORILY - CREATED INSTRUMENTALITY OF THE STATE, PETITIONER GEORGIA RESIDENTIAL FINANCE AUTHORITY, TERMINATES SECTION 8 EXISTING HOUSING PROGRAM TENANTS' TENANCIES MID-TERM PURSUANT TO THE SECTION 8 STATUTE AND HAS A PERVASIVE ROLE IN EVERY OTHER ASPECT OF THE PROGRAM ADMINISTRATION?

III. WHETHER LOW INCOME TENANTS' LEGITIMATE EXPECTATION OF CONTINUED RECEIPT OF THEIR SECTION 8 EXISTING HOUSING PROGRAM BENEFITS, INCLUDING OCCUPANCY IN A DECENT, SAFE, AND HABITABLE RENTAL UNIT AND RENT AND UTILITY SUBSIDIES FOR THE TWELVE MONTH TERM OF THEIR LEASE AND HOUSING ASSISTANCE PAYMENT CONTRACTS, ARE PROPERTY RIGHTS TO WHICH THE DUE PROCESS RIGHTS OF THE FOURTEENTH AMENDMENT, INCLUDING GOOD CAUSE FOR MID-TERM TERMINATION, ATTACH?

IV. WHETHER CERTIFICATION OF A DEFENDANT CLASS OF SECTION 8 LANDLORDS IS REQUIRED BECAUSE THERE IS A PROPERLY CERTIFIED CLASS OF TENANTS CHALLENGING A NATIONAL REGULATION, AND

PROGRAMMATIC RULES AND DOCUMENTS UTILIZED NATIONALLY PURSUANT TO SAID REGULATION, AND WHERE THERE IS ONE NAMED LANDLORD WHO WAS AN ACTIVE LITIGANT IN THE ACTION?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Katherine Jeffries, Rose Hector, Eddie Maude Franklin, and Belinda Clarke, on behalf of themselves and all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 678 F.2d 919.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the constitutional, statutory, and regulatory provisions set out in pages 2-4 of the petitioners' brief, the following authorities are pertinent to this case:

42 U.S.C. § 1437f(d)(1)(B) (as amended October 1, 1981):

(B)(i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the Secretary, and

(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

24 C.F.R. § 882.107 (as amended, August 3, 1982, 47 Fed. Reg., No. 149, p. 33500):

§ 882.107 TERM OF ACC, HOUSING ASSISTANCE PAYMENTS CONTRACT AND ASSISTED LEASE.

(a) *Term of ACC.* The term of the ACC shall be for five years.

(b) *Term of Housing Assistance Payments Contract.* The PHA and the Owner shall agree on the term of the Contract with respect to the unit. The term shall not be less than one year, nor more than three years. The term of the Contract may in no case extend beyond the remaining term of the ACC.

(c) *Assisted Lease.* (1) The term of the Assisted Lease shall begin on the first day of the term of the Contract and shall end on the last day of the term of the Contract.

(2) The housing assistance payments shall end at the end of the Contract term, or upon a prior termination of the Contract, even if the Family continues in occupancy of the unit.

(3) If the Family and the Owner wish to enter into a new Assisted Lease for an additional term for the same unit or another unit, prior PHA approval must be obtained. Upon PHA approval in accordance

with the regulations, a new tenancy will be created by execution of a new Contract in accordance with paragraph (b) of this section and a new Assisted Lease in accordance with this paragraph (c).

24 C.F.R. §§ 882.215 (as amended, August 3, 1982, 47 Fed. Reg., No. 149, p. 33500):

§ 882.215 EVICTION

(a) *For leases entered into before October 1, 1981:*

(1) The PHA shall have the sole right to give the Notice to Vacate, with the Owner having the right to make representation to the PHA for termination of tenancy.

(2) The PHA shall give the Notice to Vacate unless it finds that the grounds for eviction as stated in the Owner's representation are not sufficient under the Assisted Lease.

(b) *For leases entered into on or after October 1, 1981:* The Contract and the Assisted Lease shall provide with respect to the unit that the Owner shall neither (i) terminate the tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Family, unless the Owner decides not to enter into a new Contract with respect to the unit, except for:

(1) Serious or repeated violation of the terms and conditions of the Lease;

(2) Violation of applicable Federal, State and local laws; or

(3) Other good cause.

7. Paragraph "e" of Appendix I—Required Lease Provisions, which follows § 882.218, is revised to read as follows:

e. The Lessor shall neither (i) terminate the

tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Lessee, unless the Lessor decides not to enter into a new Contract with respect to the unit except for:

(1) Serious or repeated violations of the terms and conditions of the Lease;

(2) Violation of applicable Federal, State or local laws; or

(3) Other good cause.

STATEMENT OF THE CASE

Respondents filed this action challenging a federal regulation, 24 C.F.R. § 882.215, as void for conflict with its implementing statute at 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment. This regulation prescribed the procedures for evicting a tenant who receives benefits under the Section 8 Existing Housing Assistance Payments Program. Respondents argued that the regulation permitted a private landlord unilaterally to terminate their leases, and rent and utility subsidies. In fatal contrast, the statute required that the Public Housing Authority (PHA), petitioner Georgia Residential Finance Authority (hereinafter "GRFA") herein, respond to a landlord's request to terminate a tenant's tenancy and decide whether to issue a notice to vacate to the tenant. Transmittal of a notice to vacate, or demand for possession, is a jurisdictional prerequisite for initiating a state court dispossessory action in Georgia, and most states. Ga. Code § 61-301. Thus, under the statute, prior to its amendment, the PHA had the operative duty to prevent arbitrary evictions.

The district court ruled for the plaintiffs, striking 24 C.F.R. § 882.215 as void because of its conflict with

the statute. In addition, the district court found that "good cause" was required prior to any mid-term termination because the respondents' Section 8 benefits are property interests protected by the Constitution. *Jeffries v. Georgia Residential Finance Authority*, 503 F. Supp. 610 (N.D. Ga. 1980). The Court of Appeals affirmed at 678 F.2d 919 (11th Cir. 1982).

The petitioners did not appeal the lower court's finding that the HUD regulation is void. This was the pivotal argument in respondents' case below and is important in understanding the other arguments.

The relevant statutory section has been substantially amended to explicitly prohibit mid-term termination of Section 8 benefits without "good cause," but to permit the private landlord to send the notice to vacate. Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, U.S. Code Congressional and Administrative News, 97th Congress, First Session (No. 7, September 1981), now codified at 42 U.S.C. § 1437f(d)(1)(B). On August 3, 1982, HUD published new regulations superseding the relevant eviction, 882.215, and lease term, 882.107(b), regulations. Federal Register, Vol. 47, No. 149, pp. 33497-500.

Pursuant to the district court's final order, all lease provisions providing for termination on thirty days notice without cause were struck down as null and void. If petitioners' leases and practices were changed pursuant to the district court's order, entered December 22, 1980, by January 1, 1982, there should be no GRFA Section 8 tenants in Georgia with leases that permit mid-term termination without "good cause," because the GRFA leases are for a one-year term. Hence, the 30 day at-will termination clause utilized by GRFA, and defended in this petition,

has been found impermissible by both the district court, the United States Court of Appeals for the Eleventh Circuit, and Congress. Even if petitioners did not alter their leases until the statutory amendment of October 1, 1981, still by October 1, 1982 no one in the class, other than the speculative members suggested by petitioners, should have leases which the petitioners seek to have reviewed in this appeal.

REASONS FOR DENYING THE WRIT

1. THIS COURT IS BOUND BY THE LAW AT THE TIME OF DECISION. THE STATUTORY PROVISIONS AND REGULATIONS RELIED UPON BY PETITIONERS HAVE BEEN AMENDED, DELETING ANY ARGUABLE AUTHORITY FOR THEIR POSITION.

As originally pleaded, this action involved construction of a statutory provision, 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment, set out on page 2 of petitioners' brief, before amendment, regarding eviction procedures for a HUD-subsidized and-regulated housing program which is administered on a day-to-day basis by a State of Georgia authority, Georgia Residential Finance Authority. This statutory provision formed the basis of both the district courts and the appellate court's finding that respondents had a cognizable property right in their tenancy, and that sufficient state action existed to require procedural and substantive safeguards prior to termination of a one-year lease, in the middle of the lease term.

This statute and its implementing regulations have been amended and completely superseded by the new provisions, set forth *in toto* at pp. 2-4, *supra*.

The underlying theory of the case, and the opinions below, was that Congress, in 42 U.S.C. § 1437f(d)(1)(B),

prior to its amendment, had created a mandatory duty on public housing authorities, in this case the State of Georgia acting by and through the respondent GRFA, to control unilateral, arbitrary evictions by the participating private landlords. The means by which GRFA was to control this was by being vested with the duty to transmit the notice to vacate to the tenant. In Georgia, as well as most states, transmission of the notice to vacate is a jurisdictional prerequisite to filing a state court dispossessory action. Georgia Code § 61-301.

The courts below found that because the State of Georgia had to perform the crucial step of sending the notice to vacate, it could not act arbitrarily, and thus would be required to make a factual inquiry, weigh the credibility of the parties and the reason the landlord was seeking to evict the tenant. Moreover, to make such a fact-finding review meaningful, substantive, defined as "good cause", and procedural due process safeguards are necessary.

The HUD regulation, 24 C.F.R. § 882.215 (1979),[1]

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[1] § 882.215 EVICTION.

The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objections to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall

which prior to its amendment was challenged and found invalid, created a mere ministerial role for GRFA whereby it could only acquiesce in any landlord decision regarding evictions. Significantly, the 30-day clause in the lease was originally drafted pursuant to the regulation which was held void and illegal by the courts below. The petitioners did not appeal the decision below striking the relevant regulation. Moreover, on August 3, 1982, HUD published a new § 882.215 to conform with the new statute, and specifically prohibited 30-day termination clauses, or any lease term less than one year.

In their petition, the petitioners continue to argue the validity of the 30-day termination clause which permits mid-term evictions without cause and creates a diluted, ministerial role for GRFA to play in a threatened eviction. 24 C.F.R. § 882.107 has been specifically amended to require a minimum one year lease term and to delete its prior dispensation for a 30-day termination clause.

The underlying statute was amended on October 1, 1981, deleting the requirement that the state send the notice to vacate but explicitly requiring that the private landlords prove good cause in state court before being permitted to evict a Section 8 Existing Program tenant. HUD was a party in the district court proceedings and withdrew from the appeal proceedings before filing a brief in the Eleventh Circuit Court of Appeals because of this amendment to the relevant statute. This Court is bound by the law at the time of its decision. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-282 (1969). The authority upon which petitioners rely has been amended; and thus, this Court must deny the writ.

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telephone the PHA and shall be informed by the PHA whether a notice of determination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction.

2. RESPONDENTS' INTERESTS IN THEIR SECTION 8 LEASES, RENT AND UTILITY SUBSIDIES ARE PROTECTABLE PROPERTY INTERESTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners' first argument in support of their contention that their writ should be granted is that the court of appeals' finding that respondents have protectable property interests in continued occupancy for the term of their one-year leases comprises an unsupportable expansion of this Court's precedents. For the purpose of responding to the petitioners' argument, respondents will limit their discussion of the radical amendment of the relevant statute on October 1, 1981, because petitioners' argument completely ignores this statutory amendment. However, respondents incorporate by reference their discussion of the current law, at pp. 6-8, *supra*.

The authority for petitioners' argument against finding a property interest for the one-year term of the lease is the statute at 42 U.S.C. § 1437f(d)(2). This provision permits lease terms at any increment between one (1) month and one hundred and eighty (180) months. Petitioners' argument ignores the fact that they have chosen to utilize twelve month leases. Moreover, all of the other program documents executed between GRFA and the landlord (the Housing Assistance Payments Contract), between GRFA and HUD (the Annual Contributions Contract), and between GRFA and the tenant (Certificate of Family Participation) are required to be in existence for the term of the lease, and no less than one year nor more than three years. 24 C.F.R. §§ 882.107(b); 882.108(b). The GRFA lease itself stated:

> . . . for a term commencing on . . . and ending on

> . . . at midnight. (*The lease shall be for not less than one year nor more than three years*, but may be terminated upon 30 days advance written notice by either party). (emphasis added)

Although the issue in this action was whether Section 8 Existing tenants had a property right in occupancy for the lease term, the United States Court of Appeals for the Fourth Circuit recently found that a Section 8 Existing tenant has a property right in continued occupancy beyond the term of the lease. *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982).

The importance of the lease term in finding a property right is established by 42 U.S.C. § 1437f(C)(2)(c)(4). A tenant must be residing in a rental unit pursuant to a GRFA one-year lease before he or she will receive the benefits of the Program, *i.e.*, occupancy in a decent and habitable dwelling for the term of the lease at a set percentage of the family's income, and rent and utility subsidies. Thus, execution of the lease is the act which confers the program benefits.

The petitioners also urge that 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment, permitted the landlord to terminate a lease mid-term without cause. This section provided:

> the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy.

This section pertained to evictions. It afforded the right to the owner to "make representation to the agency for termination of tenancy." It did not give the owner the right to terminate a lease mid-term. This section simply permitted a landlord to notify GRFA that he wished to

terminate a family's tenancy or commence an eviction action.

On page 11 of their brief, petitioners rely on a carefully edited excerpt from 24 C.F.R. § 882.107(b) (1979) and their misreading of § 1437f(d)(2) (1979) to justify the summary termination of respondents' rent and utility subsidies, without notice to these tenants, and solely on request of the landlord. 24 C.F.R. § 882.107(b) stated, in pertinent part, prior to its amendment,

> . . . [t]he term of the Contract shall be for the term of the Lease; Provided, that *if a Family continues in occupancy after the expiration of the term* on the same terms and conditions as the original Lease (or changes thereto which have been approved by the PHA and incorporated in *the Contract shall continue in effect for the duration of such tenancy* . . . [emphasis supplied].

This regulation provides for housing assistance payments to be continued after the lease has expired, or after the 12 month term. It has no relevancy to a mid-term termination situation.

On page 12 of its brief, GRFA cites to HUD's alleged encouragement to employ a 30-day clause in Section 8 leases, in HUD Notice H-77-13 (PHA) issued on April 20, 1977. (Record, pp. 2983-3004). This notice expired on October 20, 1977. (Record, p. 2983). It was issued when the Section 8 Program was just commencing in most states and comprised guidance to PHAs who were initiating their Section 8 Existing Housing Programs and having difficulty convincing landlords to participate. The GRFA Section 8 Program has been fully leased since Fall 1978. This HUD suggestion expired by its own terms over five years ago and has no persuasive value.

More significantly, petitioner argues that the Court

should give deference to HUD's implementation of a statute by regulation, but utterly fails to mention the interim rule, published August 3, 1982, to replace the void 24 C.F.R. §§ 882.215, 882.107, and 882.108. Federal Register, Vol. 47, No. 149, pp. 33497-500. As the preamble to the new regulations recognizes,

> [u]nder the 1981 amendments, the statute now for the first time directly controls the term of the assisted lease: "The lease . . . shall be for at least one year or the term of [the assistance] contract, whichever is shorter. . . .

Accordingly, 24 C.F.R. § 882-107(b), upon which petitioners rely, has been amended to state: "[t]he term shall not be less than one year nor more than three years." The prior regulatory authority, although void for conflict with the prior 42 U.S.C. § 1437f(d)(1)(B), by permitting a thirty (30) day termination clause, has been totally removed from the Section 8 regulations.

In footnote 6 of their brief, petitioners misconstrue Georgia law. Although the commentators recognize that a lease in the private rental market where there is mutuality of bargaining power, may contain a mid-term termination clause which may be invoked without cause, such a clause must be "strictly construed." Pindar, *Georgia Real Estate Law*, § 11-35 (2d Ed. 1978). Further,

> [p]redictably, provisions of this nature allowing a landlord to unilaterally terminate a lease are not favored by the courts. In cases of doubt such clauses are construed against working a forfeiture and in favor of the tenant. W. Dawkins, *Landlord and Tenant, Breach and Remedies: The Law in Georgia*, § 5-4 (1979).

The contractual mutuality referred to does not exist in the context of a program which provides an equivalent of as much as 50% of a family's income, as in the case of the

named respondents.

On page 13 of their brief, petitioners assert that the court of appeals' opinion conflicts with this Court's analysis in *O'Bannon v. Town Court Nursing Center*, 100 S.Ct. 2467 (1980). In fact, this Court's reasoning in *O'Bannon* fully supports the respondents' contentions.

The question raised in *O'Bannon* was whether a nursing home patient had a sufficient property interest in residing in a specific nursing home to justify a hearing before an agency could revoke the home's certification as a qualified facility under the Medicaid Program. The decertification of the facility occurs when the governmental agency, which transfers Medicaid funds to the home as reimbursement for housing and caring for Medicaid patients, ascertains that the home does not meet minimum health and safety standards under federal regulations. The corresponding situation in the Section 8 context would arise when GRFA inspects a home in which a Section 8 certificate holder wants to enter a lease and reside as a Section 8 tenant and GRFA determines that the house fails to meet HUD's minimum property standards as not being decent, safe, and sanitary.

In *O'Bannon*, this Court held that the Medicaid statute gives patients the right to choose from a choice of qualified nursing homes:

> . . . 42 U.S.C. § 1396(a)(23) gives recipients the right to choose among a range of *qualified* providers, without governmental interference. *By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified.*

100 S. Ct. 2467. [emphasis added].

This Court goes on to decide that Medicaid patients in

nursing homes have two types of benefits, direct and indirect. Direct benefits include the financial payments made to the home on the patients' behalf. An indirect benefit, or an incidental result of the Program, is that the government will impose and enforce minimum standards of care on facilities like Town Court. 100 S. Ct. at 2476. Thus, the rights being affected in the revocation of a nursing home's certification arise from an agreement between the home and the government. This corresponds to the Housing Assistance Payments Contract executed between GRFA and a Section 8 landlord. Like the nursing home in *O'Bannon*, it is the Section 8 landlord who has the right to challenge a GRFA determination that his home fails to meet minimum property standards.

Justice Blackmun's concurrence in *O'Bannon* succinctly sets out the aspects of that case which distinguish it from the present action. Justice Blackmun recognized that

> the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits. The Constitution would not have entitled John Kelly to a fair hearing if New York had chosen to disband its public assistance programs rather than to cut off his particular award. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Nor would Texas have had to afford process to Professor Sindermann had it decided for budgetary reasons to close Odessa Junior College. See *Perry v. Sindermann*, 408 U.S. 593 (1972) . . . These observations comport with common understandings and shared expectations.

100 S. Ct. at 2482.

Furthermore,

> the case for due process protection grows stronger as

> the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision-maker's purview. For when the government acts in a way that singles out identifiable individuals in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than being simply *dealt with*.' L. Tribe, *American Constitutional Law*, § 10-7, pp. 503-504 (1978) (emphasis in original).

100 S. Ct. at 2483. *Accord, Vitek v. Jones*, 445 U.S. 480 (1980).

Justice Blackmun applies Professor Tribe's conclusion to the *O'Bannon* facts and finds that "the patients' interest has been jeopardized not at all because of alleged short-comings on their part." Moreover, Justice Blackmun determines that when public benefits are subject to adverse action upon a finding of "fault, impropriety, or incompetence" of the recipients, the Supreme Court has not hesitated to require that a hearing be afforded the recipient. *Id.*

The language in the prior 42 U.S.C. § 1437f(d)(1)(B) was derived from years of evolving case law regarding the right of federally-assisted tenants under the Fourteenth Amendment to risk-reducing procedures when threatened with eviction or loss of some other public benefit.[1] Other Supreme Court decisions in various administrative con-

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[1] *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861 (2d Cir. 1970), *cert. denied*, 400 U.S. 853; *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970); *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Lopez v. Henry Phipps Plaza South, Inc.* 498 F.2d 937 (2d Cir. 1974); *Goldberg v. Kelly*, 379 U.S. 254 (1970).

texts support the respondents' argument that a person who is legally entitled by statute, rule, or understanding to continued receipt of governmental benefits for a specific term is entitled, by the Constitution, to a hearing which demonstrates the existence of specified reasons, or good cause, for any termination or reduction of benefits.[4]

Petitioners argue that the decisions below also conflict with *Flamm v. Real-Blt, Inc.*, 168 Mont. 351 (1975), *cert. denied*, 424 U.S. 1313 (1976). (Petitioners' Brief, p. 14). In *Flamm*, the Supreme Court of Montana found that an eviction by a private landlord receiving federal assistance, through mortgage insurance and rent subsidies, did not rise to the level of state action which would trigger the due process clause. Justice Rehnquist wrote a short opinion in response to the tenants' motion to stay the Supreme Court of Montana's decision, and certiorari was denied.

From the opinion in *Flamm*, it is impossible to discern in which federal program the landlord was participating. As the district court herein found, the present case is distinguishable from *Flamm* because "state action is explicitly required by the federal statute to effect an evic-

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[4] In *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), in the context of employment contracts the Court determined that where contract or statutory terms guaranteed continued employment the existence of "sufficient cause" for nonrenewal should be shown. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court stated that existence of cause must be shown where a federal employee was being discharged. In *Meachum v. Fano*, 427 U.S. 215 (1976), the Court required a showing of misconduct prior to a prisoner transfer to a less favorable confinement. Finally, in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), the Court held that a public utility company could not terminate service "at will" but only "for cause" because customers had a "legitimate claim of entitlement" to continued service. *Id.* at 7-11.

tion of a Section 8 tenant." *Jeffries*, 503 F.Supp. at 615. Whereas, in *Flamm* the private landlord acted alone to evict the tenant.

The district court was correct in finding Justice Rehnquist's terse opinion in *Flamm* inapposite. The respondents herein argue that the 30-day lease termination clause violates the Section 8 statute; therefore, this Court cannot avoid making a ruling on the presence of state actions as it could in *Flamm*.

3. STATE ACTION IS PRESENT WHEN A STATUTORILY - CREATED INSTRUMENTALITY OF THE STATE, PETITIONER GEORGIA RESIDENTIAL FINANCE AUTHORITY, TERMINATES SECTION 8 TENANTS' TENANCIES MIDTERM PURSUANT TO THE SECTION 8 STATUTE AND HAS A PERVASIVE ROLE IN EVERY OTHER ASPECT OF THE PROGRAM ADMINISTRATION.

In order for Fourteenth Amendment due process protections to attach, state action must be present. This is a determination that the government is sufficiently involved with the activity that causes the injury. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The due process clause of the Fourteenth Amendment applies to and restricts only state government, not purely private parties. *See, Public Utilities Commission of D. C. v. Pollack*, 343 U.S. 451, 461 (1952). Petitioner GRFA is an arm of state government created by state law, Georgia Code § 99-3602, and is identified as a "public body" and "an instrumentality of the State of Georgia." Ga. Code § 99-3604.

The state action requirement is met in several ways. The State, through its instrumentality GRFA, has a role

in the operation and management of the Section 8 Existing Program which pervades every aspect of the Program. The Authority determines the eligibility of individual families for participation in the program. 24 C.F.R. § 882.209. GRFA also explains the program details to each family, both orally and through an information package which it has prepared, 24 C.F.R. § 882.209, and helps individual families locate dwelling units which meet the proper housing standards, 24 C.F.R. § 882.103. The Authority has drafted the lease which landlords must use in order to participate in the program. GRFA ascertains which landlords may participate by inspecting and approving, or rejecting, a given rental unit. 24 C.F.R. § 882.210(d).

There is a direct financial relationship between GRFA and the landlords through the Housing Assistance Payments Contract, pursuant to which the landlords receive the subsidized portion of the rent. 24 C.F.R. § 882.105. The Authority also pays Section 8 landlords for some unpaid rent and damages. 24 C.F.R. §§ 882.106 and 882.108. GRFA must certify in each instance that rents are "reasonable" before approving a lease. 24 C.F.R. § 882.106. GRFA re-audits tenants to ascertain continued eligibility at least annually. GRFA transmits the rental assistance monthly to participating landlords and sends direct utility subsidies to the tenants. For other GRFA duties see 24 C.F.R. § 882.116, generally. Specific to this case, the statute in question, prior to its amendment, required an instrumentality of the State of Georgia to issue the legally operative document, the notice to vacate, to initiate state court evictions. Unless, and until, the State of Georgia transmits a notice to vacate, the landlord cannot invoke the judicial authority of the state to dispossess a tenant.

The petitioners rely on *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974). *Jackson* is inapposite because therein the state's only involvement was to approve a termination plan. In the present case, the state, after review, performs the legally operative step which initiates the eviction process in each particular case.

In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the Supreme Court found an absence of state action. The Supreme Court framed the issue as follows:

> [t]he question presented by this case is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7-210, is an action properly attributable to the State of New York (footnote omitted).

436 U.S. at 151.

In *Flagg Brothers*, there was absolutely no action by the State of New York, other than passing the State Uniform Commercial Code. Conversely, in the case at bar the private landlord could not take action to evict a tenant until the State has held a hearing, reached a decision, and issued a notice to vacate. The private landlord can only make representation for termination of the tenancy. 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment. GRFA then processes and approves, or rejects, the request. The State of Georgia is the primary decision-maker, retaining veto power over the private party who wishes to terminate a tenant's occupancy midterm, and which similarly must take the affirmative step which is the jurisdictional prerequisite to legal eviction.

All defendant parties in this case, except the landlord, were public officials. Thus, the case is clearly distinguished from *Flagg Brothers*, 436 U.S. at 157, where the pivotal

factor was the total absence of overt official involvement. This distinguishes *Flagg Brothers* from earlier decisions which imposed procedural restrictions on creditors' remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The inquiry in *Flagg Brothers* concerned whether or not the action was that of the sovereign. Here it is. The government, in performance of the Authority's essential governmental functions by sending the notice to vacate, has acted. *See, Burton v. Wilmington Parking Authority*, 365 U.S. at 723.

4. GRFA SECTION 8 LANDLORDS ARE NOT INDISPENSABLE PARTIES UNDER RULE 19.

In its final argument, petitioner GRFA argues that the Section 8 landlords who correspond to the individual tenant members of the plaintiffs' certified class should have been joined as a defendant class. Further, petitioners assert that this defendant class is an indispensable party under Federal Rule of Civil Procedure 19. Finally, petitioners maintain that the district court's failure to join this defendant class somehow makes the certification of respondents' class invalid under Federal Rule of Civil Procedure 23. The petitioners' discussion once again ignores the fact that HUD regulations now bar the utilization of thirty-day termination clauses. Further, the petitioners continue to press this claim on behalf of a class of private parties who have not sought, at any time, to join this litigation. Of course, respondents' landlord, Russell Taptich, was a party below.

The absent Section 8 landlords herein are not indispensable parties. They are provided preprinted contracts, leases, and instructions from the State and Federal defen-

dants. These landlords do not have any choice or bargaining power with respect to the operations of the Program or the terms of the contracts and leases.

Resolution of the issues in this case will be binding on the individual landlords through the lease, contracts, instructions, and regulations which they are provided from petitioner GRFA and HUD. Because the Section 8 landlords have no latitude within which to modify the rules and operations of a federally-created, state-operated rent and utility subsidy program, their joinder is not necessary to a complete and final adjudication on the merits. The challenged regulations, practices, and policies are either illegal or they are not. The participating landlords' obligations and rights will have to comply uniformly with the Court's findings on these questions.

On page 19 of their brief, petitioners cite several cases in support of their argument that when litigation affects contractual rights, all parties to the instrument are necessary parties. However, each of these cases is inapposite because in each the parties in issue actually participated in drafting the terms of the disputed contracts. *Neal v. System Board of Adjustment*, 348 F.2d 722 (8th Cir. 1965) [Challenge to contract term negotiated by the union makes the union a necessary party because of the adjustment to a collective bargaining agreement.]; *Commonwealth Trust Co. of Pittsburgh v. Smith*, 266 U.S. 1521 (1924); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), and *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) [Involve leases drafted by the signatories and an action by another individual or group to set aside the contract]. In *Neal*, there is dictum regarding indispensable parties which was written prior to the radical revision of Rule 19 in 1966 which emphasized a more pragmatic

approach to indispensable parties.

These cases are not relevant to the issue at bar. The GRFA Section 8 landlords do not have any negotiating power with respect to the terms of the Section 8 leases and the HUD Housing Assistance Payments Contract. These are standard form leases provided by petitioner GRFA. Further, the Housing Assistance Payments Contract executed by the Section 8 landlords is a HUD form provided to the landlord and GRFA. The terms of this contract are not negotiable.

The petitioners' expressed concern in urging this position of joinder of a defendant class is that a decision in favor of the respondents would impair the landlords' abilities to protect their own interests and leave the petitioners with inconsistent obligations. This concern is groundless because of the nature of respondents' claims. Respondents challenged federal and state agencies' policies, practices, and acts as illegal under the United States Housing Act and the Fifth and Fourteenth Amendments of the United States Constitution. Thus, should the respondents prevail, the landlords would not be able to argue for the inequity of declaring invalid an unlawful agreement. *Smith v. B & O Railroad Co.*, 473 F.Supp. 572, 584 (D. Md. 1979): "There can be no vested interest in an unlawful practice." Conversely, should the respondents lose, the contested Section 8 practices and policies will continue and the Section 8 landlords, so argue the petitioners, will not be adversely affected.

Although considerations of judicial economy, double exposure of parties to liability, and judicial manageability are relevant, at the heart of the subject is the principle that whenever possible, the interests of any adversely affected party should be represented. The simple conten-

tion of respondents in the case *sub judice* is that indeed those interests were represented by the defendant landlord, R. F. Taptich, as well as by petitioner GRFA. Notably, Mr. Taptich withdrew from the appeal and did not brief or argue in the court of appeals. The interests of the petitioners already party to this action, in fact, are co-extensive with those of any individuals who would be adversely affected by a judgment for respondents. Petitioner GRFA wishes to defend the legality of the 30-day termination clause without good cause and administrative due process requirements. The defendants all had, in the proceedings below, a mutual desire to retain the clause for administrative convenience; although their motives vary, they have an identity of interests. As has been previously discussed, even the regulatory basis of support for a 30-day termination clause has been deleted. 24 C.F.R. § 882.107 (1982). For this Court to attempt to solicit or order the inclusion of other individuals to defend this action would add nothing of substance to the petitioners' position. Conversely, nothing is lost by nonjoinder of additional petitioners, for in their absence, their interests are identical to and being protected by the petitioners already before this Court.

CONCLUSION

For the foregoing reasons respondents respectfully request that this Court deny the writ.

Respectfully submitted,

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